COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-1850

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE INTEREST OF LINDAJEAN K. S., A PERSON UNDER THE AGE OF 18:

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MAUREEN J.,

RESPONDENT-APPELLANT,

LEONARD S.,

RESPONDENT.

APPEAL from an order of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed.*

DYKMAN, P.J.[1] Maureen J. appeals from a circuit court order finding that her child, Lindajean K.S., is in need of protection or services and placing Lindajean in foster care. Maureen argues that: (1) the trial court erred when it admitted evidence regarding three of her other children who had previously been removed from her home; (2) the trial court erroneously exercised its discretion when it refused to grant a mistrial because the jury heard highly prejudicial evidence regarding the other three children; (3) the trial court erred when it determined that she could not invoke the physician-patient privilege on behalf of Lindajean; and (4) the jury's finding that Lindajean was a child in need of protection or services was based on insufficient evidence.

We conclude that: (1) the trial court properly exercised its discretion when it admitted evidence regarding three of Maureen's other children; (2) the trial court properly exercised its discretion in refusing to grant a mistrial; (3) Maureen could not invoke the physician-patient privilege on behalf of Lindajean; and (4) the evidence was sufficient to support the jury's finding. Accordingly, we affirm.

BACKGROUND

Lindajean was born to Maureen on December 28, 1993. On February 2, 1996, Lindajean was removed from Maureen's home on a temporary basis and placed in foster care. On February 5, the circuit court found that it was contrary to Lindajean's welfare to be returned to the parental home at that time and ordered continued placement in foster care. That same day, the court appointed Attorney David Hellman as Lindajean's guardian ad litem.

[1] This opinion is decided by one judge pursuant to § 752.31(2)(e), STATS.

On February 7, the Monroe County Department of Human Services ("department") filed a CHIPS (child in need of protection or services) petition, alleging that Lindajean was in need of protection or services under § 48.13(10), STATS.[2] Under this section, the court has exclusive original jurisdiction over a child alleged to be in need of protection or services and "[w]hose parent … neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child."

The department filed a motion in limine to admit evidence of a 1994 termination of parental rights proceeding in La Crosse County involving Maureen and three of her other children. At the motion hearing, the court agreed to allow this evidence because it was akin to prior acts in a criminal proceeding. Before trial, the court clarified its earlier ruling, stating that the department would be allowed to admit evidence regarding the other three children, but would not be allowed to admit evidence that Maureen's parental rights to these children were terminated or that a petition for the termination of parental rights was filed.

On the morning of trial, Maureen requested to invoke the physician-patient privilege on behalf of Lindajean regarding the testimony of several doctors. The trial court denied the request, concluding that the privilege did not apply. During trial, Maureen requested to invoke the physician-patient privilege on behalf of Lindajean when the department called Dr. Conrad Andringa to testify. The court ruled that the privilege was not available under § 905.04(4)(e), STATS.,[3]

---

[2] The petition also alleged that Lindajean was in need of protection or services under § 48.13(10m), STATS. This allegation was dismissed from the petition.

[3] Section 905.04(4)(e), STATS., reads:

(continued)

because the issue in this case is neglect. Maureen also requested to invoke the privilege when the department called Dr. John-Peter Temple and Dr. Peter Ahmann to testify. The court denied the requests on the same grounds.

On November 22, 1996, after a two-day trial, the jury found that Lindajean was in need of protection or services. At the December 17, 1996 dispositional hearing, the trial court found that Lindajean was a child in need of protection or services because she was neglected and placed her in a foster home under the department's supervision. Maureen appeals.

DISCUSSION

Maureen first argues that the trial court erred when it admitted evidence regarding the three other children. The trial court allowed Jean White, a social worker for La Crosse County Human Services, to testify as to her experiences in La Crosse County with Maureen and three of her other children—Ashley, Bruce and Charles. White testified that Maureen's residence was always in terrible condition, with garbage on the stove and in the sink, pans and dishes on the floor, animal feces everywhere, and laundry scattered about. She testified that socks, underwear and bed sheets were in short supply. She testified that the

---

(e) *Abused or neglected child.* 1. In this paragraph:

a. "Abuse" has the meaning given in s. 48.02(1).

b. "Neglect" has the meaning given in s. 48.981(1)(d).

2. There is no privilege in situations where the examination of an abused or neglected child creates a reasonable ground for an opinion of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor that the abuse or neglect was other than accidentally caused or inflicted by another.

children did not listen to Maureen, were cruel and destructive, and urinated and defecated on the floor.

White also testified that Ashley routinely took off her clothes and flashed her private parts to others and that the boys had taken out their penises and put them on Christmas lights. The court believed that this testimony was getting prejudicial and requested the department to limit its examination of the witness. Maureen's counsel made a motion to strike this testimony and moved for a mistrial. The court overruled the motion because the purpose of the testimony was to show that Maureen has never had control over her children.

The department argues that the evidence regarding Maureen's other three children is admissible under § 904.04(2), STATS. Under this section, evidence of other acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. However, evidence of other acts is admissible when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.***

Whether other acts evidence is admissible is committed to the trial court's discretion. ***State v. Peters***, 192 Wis.2d 674, 694, 534 N.W.2d 867, 875 (Ct. App. 1995). "We will uphold the trial court's admission of other acts evidence as long as the record discloses a reasonable basis for the court's decision." ***Id.*** at 695, 534 N.W.2d at 875. In ***State v. Rushing***, 197 Wis.2d 631, 645, 541 N.W.2d 155, 161 (Ct. App. 1995), the court set forth the test for admitting other acts evidence:

> Admission of other acts evidence is governed by a two-part test. First, the trial court must decide whether the proffered other acts evidence fits within one or more of the

> permitted uses set forth in § 904.04(2), STATS. Implicit in this first step is a determination that the proffered other acts evidence is relevant to the case. The second part of the test requires the trial court to determine whether the danger of unfair prejudice in admitting the proffered evidence substantially outweighs the probative value of the evidence, so as to warrant exclusion of the evidence. Section 904.03, STATS.

(Citations omitted.)

The trial court admitted evidence regarding the other three children because it was relevant to Maureen's motive, knowledge and the absence of mistake or accident. We believe that the trial court properly exercised its discretion in admitting this evidence under § 904.04(2), STATS.

At trial, several witnesses testified as to events where Lindajean was out of control and Maureen did nothing to control her behavior. For example, Fred Odiet, a physician's assistant, testified that Lindajean would run through the halls of his clinic, go to the optometry clinic and tear glasses off the wall. On one occasion, Lindajean walked into his office, went through six of his drawers, some of which contained drug samples, and took food out of a drawer. A sharp letter-opener was laying on his desk at the time. Maureen did nothing to control Lindajean's behavior.

In addition, Danielle Backhaus, a social worker for the Monroe County Department of Human Services, testified that she was visiting Maureen's residence one day when Lindajean ran out the door and toward the main highway. Maureen continued her conversation with Backhaus and did not pursue Lindajean. Backhaus told Maureen that Lindajean just ran out of the trailer, but Maureen did nothing. Eventually Backhaus ran out of the trailer, caught Lindajean near the

road, and brought her back. Maureen continued with their conversation as if nothing had happened, responding that Lindajean "does it all the time."

To prove that Lindajean was a child in need of protection or services under § 48.13(10), STATS., the department needed to establish that Maureen "neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child." The jury could have believed that the events described by Odiet and Backhaus were accidental, isolated events that would not seriously endanger Lindajean's physical health. Or the jury could have believed that these events showed a pattern of neglect that seriously endangered the physical health of the child. The testimony regarding the other three children tends to prove that Maureen's failure to control Lindajean was not due to an accident or mistake. Because the evidence was offered to prove that Maureen's failure to control Lindajean was not an accident or mistake, we conclude that the trial court properly exercised its discretion when it admitted the other acts evidence under § 904.04(2), STATS.

Maureen also argues that the trial court erroneously exercised its discretion when it refused to grant a mistrial because the jury heard highly prejudicial evidence regarding the other three children. We conclude that the court properly exercised its discretion. The evidence was admissible under § 904.04(2), STATS., and probative of whether Maureen's failure to control Lindajean seriously endangered her physical health.

In addition, the trial court minimized the prejudicial effect of the evidence by reading a cautionary instruction to the jury. The jury was instructed to consider evidence regarding the other children only on the issues of knowledge

and absence of mistake or accident. The jury was instructed that it could not consider this evidence to conclude that Maureen had a certain character or certain character trait and acted in conformity therewith. We do not believe that the danger of unfair prejudice outweighed the probative value of the evidence.

Maureen next argues that the trial court erred when it determined that she could not invoke the physician-patient privilege on behalf of Lindajean. Dr. Conrad Andringa, a pediatrician; Dr. John-Peter Temple, a pediatric neurologist; and Dr. Peter Ahmann, also a pediatric neurologist; had all previously examined Lindajean and were called by the department to testify. After each was called to testify, Maureen asked to invoke the physician-patient privilege on behalf of Lindajean. The court ruled that the privilege was not available because the issue in this case is neglect.

The decision to admit or exclude evidence lies within the trial court's sound discretion. ***State v. Solberg***, 211 Wis.2d 372, 386, 564 N.W.2d 775, 781 (1997). We will sustain the trial court's discretionary decision if it examined the facts of record, applied a proper legal standard and reached a reasonable decision. *See* ***Id.***

In determining whether the trial court applied the proper legal standard, we must determine whether it interpreted § 905.04, STATS., correctly. This presents a question of law that we review *de novo*. *See* ***Steinberg v. Jensen***, 194 Wis.2d 439, 458, 534 N.W.2d 361, 368 (1995). "Evidentiary privileges interfere with the trial court's search for the truth and must be strictly construed." ***State v. Locke***, 177 Wis.2d 590, 602, 502 N.W.2d 891, 896 (Ct. App. 1993).

The trial court ruled that the physician-patient privilege was not available under § 905.04(4)(e), STATS., because the issue in this case is neglect.

We do not believe that this section creates a blanket exception to the privilege in cases where neglect is an issue. Section 905.04(4)(3) states that "[t]here is no privilege in situations where the examination of [a] … neglected child creates a reasonable ground for an opinion of the physician … that the … neglect was other than accidentally caused or inflicted by another." Therefore, in order for the exception to apply, the physician must have formed the opinion that the neglect of the child was other than accidentally caused or inflicted by another.

On voir dire examination, Dr. Andringa testified that neglect and verbal abuse was part of his differential diagnosis of Lindajean, but he did not testify as to whether he believed the neglect was other than accidentally caused. Dr. Temple testified that there was nothing that he directly observed in examining Lindajean that would indicate that she was neglected by her mother or anyone else. And Dr. Ahmann testified that he did not make any determination as to whether Lindajean was being neglected. Because the physicians did not form the opinion that Lindajean was neglected or that the neglect was other than accidentally caused or inflicted by another, the § 905.04(4)(e), STATS., exception to the physician-patient privilege does not apply to their testimony. Therefore, we conclude that the trial court erroneously exercised its discretion in admitting the testimony pursuant to this section.

This does not end our inquiry, however. Because the exercise of discretion is essential to the trial court's functioning, we generally look for reasons to sustain the trial court's discretionary determinations. ***Burkes v. Hales***, 165 Wis.2d 585, 591, 478 N.W.2d 37, 39 (Ct. App. 1991). We will affirm the trial court's decision if it reaches the right result for the wrong reason. *See* ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985). We may

sustain a lower court's holding on a theory or on reasoning not presented to the lower court. ***Id.*** at 125, 382 N.W.2d at 687.

Under § 905.04(3), STATS., the physician-patient privilege may be claimed by the patient's guardian. Maureen attempted to invoke the physician-patient privilege on behalf of Lindajean as her guardian. Maureen was not acting as Lindajean's guardian at the CHIPS proceeding, however, as the court appointed a guardian ad litem to represent Lindajean's best interests. It was up to the guardian ad litem, not Maureen, to invoke the privilege on behalf of Lindajean.

In ***State v. Speese***, 199 Wis.2d 597, 607-08, 545 N.W.2d 510, 515 (1996), both parties conceded that when a minor's interests may not coincide with those of the minor's parents, a guardian ad litem should be appointed to represent the minor and decide whether to invoke or waive the physician-patient privilege on behalf of the child. However, the supreme court declined to determine "whether and under what circumstances a circuit court must appoint a guardian ad litem or counsel to assist a minor in making a decision regarding the physician-patient privilege." ***Id.*** at 608, 545 N.W.2d at 515. But here, we do not need to determine whether a guardian ad litem should have been appointed for Lindajean. The circuit court did appoint a guardian ad litem, and in fact was required to appoint one under § 48.23(3m), STATS. Therefore, the guardian ad litem, not Maureen, had the authority to invoke the privilege under § 905.04(3), STATS.

Our conclusion is supported by ***State v. S.H.***, 159 Wis.2d 730, 465 N.W.2d 238 (Ct. App. 1990). S.H. was charged with twelve counts of first-degree sexual assault involving his three minor children. ***Id.*** at 733, 465 N.W.2d at 239. He executed authorizations for the release of his children's treatment records from their meetings with a clinical social worker. ***Id.*** at 734, 465 N.W.2d at 239-40.

Because the children's mother opposed the release, the counseling center would not release the records until after a court hearing. ***Id.*** at 734, 465 N.W.2d at 240. At the hearing, the children's guardian ad litem claimed the psychologist-patient privilege on behalf of the children. ***Id.*** We concluded that the guardian ad litem's assertion of the privilege on behalf of the children pursuant to § 905.04(3), STATS., superseded the father's authorization. ***Id.*** at 736, 465 N.W.2d at 240. Under ***S.H.***, it is clear that when a guardian ad litem is appointed for a minor child, it is the guardian ad litem, not the child's parent, who has the authority to claim the physician-patient privilege on behalf of the child.

Maureen argues that ***Speese*** and ***S.H.*** do not apply here because they involve the sexual abuse of a child by a parent and the parent's ability to waive the privilege, while this case does not involve sexual assault and the parent was attempting to invoke the privilege. We see nothing in the language of ***Speese*** and ***S.H.*** that would limit their application to situations in which a child is sexually abused and the parent attempts to waive the privilege on behalf of the child. In fact, the ***Speese*** court stated that it was facing the issue "of who can *assert and waive* the physician-patient privilege, Wis. Stat. 905.04(2), when the patient whose medical records are sought is a minor." ***Speese***, 199 Wis.2d at 607, 545 N.W.2d at 514-15 (emphasis added). The question of who may *waive* the privilege was not the only issue raised; the court also faced the issue of who may *assert* the privilege.

Our conclusion is consistent with the reasoning of other jurisdictions that have addressed the same issue. For example, the court in ***In re Adoption of Diane***, 508 N.E.2d 837, 840 (Mass. 1987), reasoned:

> In a case such as this, where the parent and child may well have conflicting interests, and where the nature of the

> proceeding itself implies uncertainty concerning the parent's ability to further the child's best interests, it would be anomalous to allow the parent to exercise the privilege on the child's behalf. The anomaly is magnified when, as here, neither the child's attorney nor the guardian ad litem chose to exercise the privilege.

See also ***Arizona v. Hunt***, 406 P.2d 208, 219-20 (Ariz. Ct. App. 1965); ***State ex rel. Wilfong v. Schaeperkoetter***, 933 S.W.2d 407, 409 (Mo. 1996); ***Ellison v. Ellison***, 919 P.2d 1, 3 (Okla. 1996).

Maureen argues that if we determine that she did not have the authority to invoke the privilege, we should remand the case because the guardian ad litem was not asked to waive or invoke the privilege on behalf of Lindajean and, therefore, did not make a determination. We do not agree that a remand is necessary. Section 905.04, STATS., does not state that a physician may not testify absent an affirmative waiver of the physician-patient privilege. Section 905.04(2) provides that "[a] patient has a privilege … to prevent any other person from disclosing confidential communications." And § 905.04(3) states that "[t]he privilege may be claimed … by the patient's guardian." Reading these two subsections together, it appears that the patient's guardian must claim the privilege in order to prevent the patient's physician from testifying as to confidential communications. Because Lindajean's guardian ad litem did not affirmatively claim the physician-patient privilege, we conclude that the trial court did not erroneously exercise its discretion in allowing the physicians to testify.

Moreover, we do not see any reason why the guardian ad litem would have invoked the physician-patient privilege on Lindajean's behalf. The issue in this case was whether Maureen "neglect[ed], refuse[d] or [was] unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child."

See § 48.13(10), STATS. The guardian ad litem was appointed to represent Lindajean's best interests. We believe that it was clearly in Lindajean's best interests to let the jury hear all testimony relevant to whether she was in need of protection or services under this section. This relevant evidence included the physicians' testimony.

Finally, Maureen argues that the jury's finding that Lindajean was a child in need of protection or services was based on insufficient evidence. If there is any credible evidence that, under any reasonable view, fairly allows of an inference that supports the jury's finding, that finding will be sustained. ***In re J.A.B.***, 153 Wis.2d 761, 770, 451 N.W.2d 799, 802 (Ct. App. 1989). The jury determines the credibility and weight to be given to individual testimony. ***Id.***

We conclude that the jury's finding that Lindajean is in need of protection or services is supported by credible evidence. We have already summarized the testimony of Jean White regarding Maureen's failure to control three of her other children that had been removed from the home. We have summarized the testimony of Fred Odiet and Danielle Backhaus regarding specific instances in which Maureen did nothing to prevent Lindajean's potentially dangerous behavior.

Backhaus also testified that in January 1996, Maureen called her and said that Lindajean was completely out of control, diving head first off the couch and onto the floor, climbing on the stove and into the oven, throwing herself on the floor, and banging her head into the wall and onto the floor. Maureen told Backhaus that she was overwhelmed and exhausted, but declined to accept respite services when they were offered by Backhaus. On February 2, Maureen again called Backhaus and said that Lindajean continued to hurt herself and that she

could not control her. Backhaus again offered services, and again Maureen turned them down.

Backhaus went to Maureen's house on February 2, along with a coworker and two police officers, to remove Lindajean from her care. The outside temperature and wind chill factor were very cold that day, estimated by Backhaus's coworker to be thirty degrees below zero. When Backhaus arrived, Maureen was installing an antenna and the door to her home was wide open. Lindajean was standing near the open door and was not wearing any socks or shoes or a coat.

Dr. Andringa testified that Maureen attempted to discipline and control Lindajean by using rude, vulgar and threatening language. By Andringa's observations, Maureen's attempts to control Lindajean were unsuccessful. Dr. Temple testified that Maureen seemed powerless to control Lindajean's aggressive and compulsive behavior. Temple outlined for Maureen an eight-step plan to modify Lindajean's behavior, but Maureen did not pursue any part of it. And Dr. Ahmann testified that Maureen's reports that she could not control Lindajean concerned him and that uncontrollable children could present a danger to themselves.

The jury heard credible evidence on which to conclude that Maureen's failure, refusal or inability to control Lindajean's behavior seriously endangered Lindajean's physical health. Therefore, we will sustain the jury's verdict and affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.